

# **Guardians/Conservators for Incapacitated Adults**

## **Overview of Issues**

### **October 17, 2017**

#### **Background**

- When an adult is unable to care for themselves, a number of actions can be taken, such as arranging for care through a family member or professional caregiver, establishing power-of-attorney, or appointing a guardian and/or conservator to make decisions for the adult, which is typically done by family members.
- As the number of older adults is expected to nearly double by 2050, the need for guardians and conservators likely will increase.
- According to the National Center for State Courts, there are about 1.3 million open guardian or conservator cases nationwide, involving about \$50 billion under state courts' watch.
- As of May 2017, Virginia's Public Guardian and Conservator Program for adults who are indigent, incapacitated, and do not have a family member or friend able to be their guardian/conservator serves over 800 people (with more than 600 people on a waiting list for services), according to the Virginia Department of Aging and Rehabilitative Services.

#### **Types of Guardians**

- A guardian is responsible for the personal affairs of an incapacitated person, and makes decisions regarding support, care, health, safety, habilitation, education, therapeutic treatment, and residence. The types of guardians include:
  - *Full guardianship*: the guardian makes all personal and personal care decisions for the incapacitated adult;
  - *Limited guardianship*: the court places limitations on the guardian's authority to make personal and personal care decisions, such as restricting the guardian's authority to a specific aspect of the adult's life;
  - *Temporary guardianship*: the guardian is appointed for a set time period, and serves as guardian until a set date or the completion of a task;
  - *Standby guardianship*: a person is appointed to become the guardian of an incapacitated person when the individual currently responsible for providing care dies; and,
  - *Emergency guardianship*: when an emergency exists, an emergency guardian can be appointed through an expedited process for 15 days (with one five-day renewal, if needed) to authorize needed protective services – this type of guardian must be requested by the local department of social services.

#### **Types of Conservators**

- A conservator is responsible for managing the estate and financial affairs of an incapacitated person. The types of conservators include:
  - *Full conservator*: the conservator is appointed without limitations to make all financial decisions for the person;
  - *Limited conservator*: the conservator is appointed to provide decision-making assistance for specific financial matters; and,
  - *Temporary conservator*: the conservator is appointed for a set time period, and serves as conservator until a set date or the completion of a task.
- Virginia Code currently does not provide authority to appoint an emergency conservator.

### **Appointing a Guardian/Conservator**

- The legal process for appointing a full guardian/conservator, temporary guardian/conservator, limited guardian/conservator, and standby guardian typically takes two to three months if the appointment is not contested. When the appointment is contested, the matter must be scheduled for trial and the process may take longer.
- To begin this process, any adult or entity (including local departments of social services) files a petition with the circuit court.
  - Local departments of social services file petitions for guardians and/or conservators when an investigation by Adult Protective Services (APS) reveals that an incapacitated adult is being abused, neglected, and/or exploited, needs help caring for themselves or their finances, and no family member or friend is willing and/or able to file the petition.
- After the petition is filed, the circuit court appoints a guardian ad litem to represent the interests of the adult, and service of process is required on the adult, as well as all parties listed in the petition.
- Prior to the court hearing, a licensed physician, psychologist, or other licensed professional prepares an evaluation report assessing the physical or mental conditions of the adult. This report is filed with the circuit court and given to the guardian ad litem (if the report is not available, the court hearing can proceed with good cause shown and absent objection by the guardian ad litem).
- After a circuit court hearing during which evidence is presented and witnesses can be called, the presiding judge decides if the person is incapacitated and appoints a guardian and/or conservator. It is important to note that only a circuit court judge can make this determination, and poor judgement is not considered sufficient evidence of incapacitation.
- Often, a family member is appointed to be the person's guardian and/or conservator, but a lawyer, friend of the adult, public guardian/conservator, or volunteer may also be appointed.
- The legal process for appointing an emergency guardian is expedited and typically takes one to two days, as the existence of an emergency necessitates the speedy appointment of an emergency guardian.
- In Fairfax County in FY 2017, APS investigated 1,193 cases and found 94 substantiated cases of financial exploitation, leading to the appointment of guardians and conservators in 11 cases and an emergency guardian in one case.

### **Oversight of Guardians and Conservators**

- Throughout the nation, there have been reports of guardians and/or conservators abusing the adults they were charged with protecting. Each state has a different guardianship/conservator system, with different practices, requirements, and oversight mechanisms.
  - Virginia law requires guardians to file annual reports, which include specific information concerning the status of the incapacitated adult, with the local department of social services. Conservators are required to make an initial report of all money and property received within the first four months after appointment, and annual reports thereafter, to the commissioner of accounts.
- A 2011 Government Accountability Office (GAO) report found that improved monitoring of guardians and conservators is needed, and a 2016 GAO report found that the extent of abuse

nationally is unknown (this report also highlighted cases of elder abuse, including two Virginia cases of financial exploitation by guardians).

- A recent Virginia survey of circuit court clerks revealed that few courts had training/orientation or active monitoring programs for guardians/conservators.
- In Fall 2016, Virginia Supreme Court Chief Justice Donald W. Lemons created the Virginia Working Interdisciplinary Network of Guardianship Stakeholders (WINGS), which is a court-community partnership including representatives from the judicial, legal, aging, disability, mental health, and guardianship fields. States throughout the country are using WINGS to improve practices in their guardianship and conservator system.

#### **Anticipated 2018 General Assembly Legislation**

- The Commonwealth Council on Aging's 2017 Annual Report to the Governor and General Assembly includes strengthening court oversight for all guardians and conservators as one of its policy recommendations, and other social service advocacy groups also have expressed interest in this topic.
- There is also interest in amending the Virginia Code to allow circuit court judges to appoint an emergency conservator for an incapacitated adult at risk of financial exploitation where circumstances require immediate action, as the appointment of a full, limited, or temporary conservator can take several months. The proposal currently under consideration aims to provide swift protection for adults by appointing an emergency conservator for 15 days, with the option to renew the appointment for an additional five days.
  - If this proposal is enacted, staff anticipate that the Office of the County Attorney would only file a petition for the appointment of an emergency conservator under rare circumstances, and only following an investigation by APS and medical professionals.
- Staff will monitor for the introduction of relevant legislation by the 2018 General Assembly, and bring bills to the Legislative Committee for consideration by the Board of Supervisors.